STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Illinois Bell Telephone Company,	**)**	
AT&T Communications of Illinois, Inc.,	**)**	
TCG Illinois, TCG Chicago, TCG St. Louis,	**)**	
WorldCom, Inc.,	**)**	
McLeodUSA Telecommunications Services, Inc.,	**)**	
XO Illinois, Inc.,	**)**	
NorthPoint Communications, Inc.,	**)**	
Rhythms Netconnection and Rhythms Links, Inc.,	**)**	
Sprint Communications L.P.,	**)**	**No. 01-0120**
Focal Communications Corporation of Illinois,	**)**	
and	**)**	
Gabriel Communications of Illinois Inc.	**)**	
	)	
	)	
Petition for Resolution of Disputed Issues	**)**	
Pursuant to Condition (30) of the SBC/Ameritech	**)**	
Merger Order.	**)**	

BRIEF ON EXCEPTIONS OF AMERITECH ILLINOIS

TABLE OF CONTENTS

Page

EXECUTIVE SUMMARY

This docket was opened pursuant to an agreement between Ameritech Illinois and this Commission on which the Commission conditioned its approval of the merger between SBC and Ameritech. Condition 30 required Ameritech Illinois to implement the system of performance measures and standards, and the associated plan for remedies to enforce those standards, that were used by Southwestern Bell Telephone Company ("SWBT") in Texas. The Commission found that implementation of the Texas performance measures and standards "will have procompetitive benefits for CLECs and end users in Illinois" and that the associated remedy plan would help "ensure full compliance with the [merger] conditions." Sept. 23, 1999 Order, Docket No. 98-0555, at 220, 228 ("*Illinois Merger Order*").

The passage of time has proved that the plan required by Condition 30 has indeed worked. Due, in part, to the existence of the performance measures, standards, and remedy plan, Ameritech Illinois improved its performance by instituting numerous operational enhancements, including (1) the implementation of a formal Wholesale Improvement Team led by a Vice President dedicated to that team and including vice presidents and officers from the Network, Information Technology, and Regulatory groups, (2) daily analyses of performance in the Network Operations Center, (3) a zero tolerance policy for "misses" in wholesale performance, and (4) the development of Performance Improvement Plans by responsible organizations for all out-of compliance measures. Am. Ill. Ex. 1.0 (Fioretti Rebuttal) at 6-7. These led to dramatic improvements in compliance. *Id.* at 6.

Further confirmation that the existing plan works has come from the FCC's endorsement of virtually identical plans in the SWBT states. After the *Illinois Merger Order*, the FCC approved SWBT's application to provide long-distance service in Texas, and praised the "clearly defined performance measurements and standards" in that state as a significant factor in its decision. *In re Application by SBC Communications Inc. et al. to Provide In-Region, InterLATA Services in Texas*, 15 F.C.C. Rcd. 18,354, ¶ 5 (June 30, 2000) ("*Texas 271 Order*").[1] Likewise, the FCC found that the Texas remedy plan "provides additional assurance that the local market will remain open" after long-distance approval, because it "would discourage anti-competitive behavior by setting the damages and penalties at a level above the simple cost of doing business." *Id.* ¶¶ 420, 422. The FCC subsequently endorsed the performance measures, standards, and remedy plans used in Kansas, Oklahoma, Arkansas, and Missouri, which were all taken from the same Texas model this Commission approved for use in Illinois. *See infra* at 8.

As part of the merger order, the Commission directed Ameritech Illinois to participate in collaborative discussions with competing carriers and Staff "[f]or a minimum of one year following the Merger Closing Date" (*Illinois Merger Order*, at 259) to discuss potential modifications to the performance measures, standards, and remedy plan. The parties reached agreement on modifications to performance measures and standards, but could not reach agreement with respect to the remedy plan. The CLECs proposed to replace the existing remedy plan with an entirely different plan that has not been approved by the FCC or by any state commission in the Ameritech region. Staff, meanwhile, correctly opposed the CLEC plan but incorrectly sought to make several significant alterations to the existing plan. Ameritech Illinois opposed such significant changes on the ground that the existing plan had proved more than adequate based on its approval by the FCC and the actual experience in Illinois.

The *Illinois Merger Order* (at 260) states that "[t]he participant proposing the addition, deletion, or change" to the existing performance plan "retains the burden of proving that such

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[1] Pertinent excerpts from the *Texas 271 Order*, and other authorities cited in this brief, were included in a separate Appendix filed with Ameritech Illinois's post-hearing brief on September 28, 2001. The *Arkansas & Missouri 271 Order* referenced below, which was issued after the post-hearing briefs, is included as a supplemental appendix with this filing.

addition, deletion, or change should be adopted in Illinois." And given that the FCC has now approved similar remedy plans for five states, that burden is a heavy one. Clearly, the Commission did not intend a major overhaul or complete replacement of the Remedy Plan in midstream – as confirmed by the merger order itself, which provides that collaborative discussions of changes to the Texas plan would last for a minimum of one year (*id.* at 259) – and experience under the Plan shows that no such drastic action is necessary. Further, the Commission expressly stated that its purpose in adopting the Remedy Plan was "not to penalize the company but rather to have compliance with our order." *Id.* at 221.

This proceeding is established pursuant to, and governed by, the *Illinois Merger* Order and the underlying agreement between Ameritech Illinois and the Commission. And for the most part, the Proposed Order recognizes the principles of the merger order and agreement. To take the most prominent example, the ALJs were entirely correct to reject the CLECs' proposed plan. And although the Proposed Order recommends some modifications to the existing remedy plan, Ameritech Illinois does not object to most of them. There are two modifications, however, that are so substantial – and represent such significant departures from the remedial principles underlying the *Illinois Merger Order* and from the four corners of the agreement between Ameritech Illinois and the Commission – that Ameritech Illinois must take exception. Further, one proposed modification requires clarification.

I. There is no evidence to support the Proposed Order's recommendation that payment amounts be multiplied. To the contrary, the Proposed Order fails to recognize that the existing plan already provides sufficient incentive for compliance, and already contains mechanisms to multiply payments in the event that performance shortfalls continue over consecutive months. Multiplying these amounts arbitrarily would achieve nothing but to penalize Ameritech Illinois, the exact result the Commission rejected in its merger order.

II. The Proposed Order's suggested elimination of the "K table," which the existing plan uses to evaluate performance results in the aggregate, is designed to continue assessing large amounts of payments in error, even if Ameritech Illinois achieves full compliance with the nondiscrimination requirements of the law. Plainly, that result is neither fair nor lawful, nor does it encourage compliance the way the Commission intended in its merger order.

III. There is also one recommended change that requires clarification. The Proposed Order creates a procedure by which CLECs can "opt in" to the revised Remedy Plan. The Commission should clarify that procedure to ensure that it works smoothly and quickly, as the Proposed Order intends.

BACKGROUND

I. OPERATIONS SUPPORT SYSTEMS ("OSS") AND PERFORMANCE MEASURES

Operations support systems ("OSS") are the electronic systems, information, and processes that Ameritech Illinois uses to serve its customers. The FCC has held that incumbent local exchange carriers like Ameritech Illinois must make their OSS available to requesting carriers on a nondiscriminatory basis, so that those competitors may use the incumbent's OSS to support their own efforts. The FCC takes a two-step approach to analyzing compliance with this requirement. The first step is to determine whether the incumbent has made its OSS available to requesting carriers. The second step is to evaluate whether those OSS really work, in a nondiscriminatory fashion — in other words, "whether the OSS functions that the BOC has deployed are operationally ready, as a practical matter." *Texas 271 Order*, ¶ 96. In assessing the latter criterion, operational readiness, the FCC prefers evidence of actual commercial use, which it deems "[t]he most probative evidence that OSS functions are operationally ready." *Id.* ¶ 98.

The principal form of evidence of commercial use comes from *performance measures*: data that summarize the results of certain wholesale and retail operations (such as the time to install service) for a reporting period (typically, each month). Some performance measures are expressed as an *average*, such as the average time in hours to install or repair service. Others are expressed as a *proportion*, such as the percentage of due dates missed as compared to total installations. The remaining measures are expressed as a *rate*, such as the rate of "trouble" on lines. Performance data are generally broken down, or disaggregated, into separate measurement categories for each applicable product or service (*e.g.*, resale, unbundled loops), customer type (*e.g.*, residential, business), and certain other characteristics (*e.g.*, whether or not the order requires the "dispatch" of field personnel) to provide a more meaningful comparison. Am. Ill. Ex. 1.0 (Fioretti Direct) at 3.

The data in these performance measures are typically compared against standards, or target levels. *Id.* Many wholesale functions correspond to an analogous function in Ameritech Illinois' retail operations. *Id.* In those cases, the retail outcome is the standard level for wholesale performance in that reporting period; in other words, the standard is "parity" between wholesale and retail. *Id.* at 3-4. Where there is no meaningful retail analog, a pre-set "benchmark" has been established based on a collaborative process between Ameritech Illinois, competing carriers, and the Commission's Staff. *Id.* at 4. This is the same two-part approach that the FCC uses to evaluate OSS access. *See, e.g., Texas 271 Order*, ¶¶ 94-95.

The FCC has "found that performance measurements provide valuable evidence" regarding an incumbent's compliance or noncompliance with statutory requirements. *In re Joint*

Application by SBC Communications Inc., et al. for Provision of In-Region, InterLATA Services in Kansas and Oklahoma, 16 F.C.C. Rcd. 6237, ¶ 31 (Jan. 22, 2001) ("*Kansas & Oklahoma 271 Order*"). At the same time, however, the FCC has "emphasize[d]. . . that we do not view each particular metric as wholly dispositive." *Id.* Rather, the ultimate question – whether the incumbent has complied with the Act's nondiscrimination standard – "can only be decided based on an analysis of specific facts and circumstances." *Id.* ¶ 29. Thus, "[w]here a statistically significant difference exists" between wholesale performance and the applicable standard, "we will examine the evidence further" – considering, for example, the degree, duration and explanation for that disparity – to "make our ultimate determination of whether the statutory nondiscrimination requirements are met." *Id.* ¶ 31.

Condition 30 of the Commission's approval of the SBC/Ameritech merger required Ameritech Illinois to review and implement, to the extent feasible, the "performance measurements and related standards/ benchmarks that SBC has agreed to implement in Texas as a result of the Texas collaborative process." *Illinois Merger Order*, at 256. The Commission explained that implementation of the Texas performance measures and standards "represents a substantial improvement over the status quo in Illinois, and will have procompetitive benefits for CLECs and end users in Illinois that would not exist absent the merger." *Id.* at 228. Likewise, in approving SWBT's application to provide long-distance service in Texas, the FCC expressly approved the "clearly defined performance measurements and standards" developed by the Texas Public Utilities Commission and used by SWBT. *Texas 271 Order*, ¶ 5.

Ameritech Illinois thus uses the same performance measures and standards that were developed in Texas and approved by the FCC, with adaptations (and several additional measurements) agreed to in collaborative workshops established by this Commission as a condition of merger approval. Am. Ill. Ex. 1.0 (Fioretti Direct) at 4-5. In the February 5, 2001 Joint Petition that opened this docket, the collaborative participants presented the measures developed in Texas and modified in the Illinois collaborative to this Commission for approval. Am. Ill. Ex. 4. As a result of the Joint Petition, Ameritech Illinois' performance measurement plan consists of over 160 performance measurements, divided into over 3,000 categories. Am. Ill. Ex. 1.0 (Fioretti Direct) at 3.[2]

II. PERFORMANCE ASSURANCE PLANS

The "remedy plan" here is a system of self-executing "liquidated damages" to be paid by Ameritech Illinois to competing carriers, and "assessments" to be paid to the State of Illinois, in the event performance fails to meet the established standards. Am. Ill. Ex. 1.0 (Fioretti Direct) at 5. As with the underlying performance measures and standards these payments help enforce, Condition 30 of the *Illinois Merger Order* required Ameritech Illinois to review and implement "the remedies agreed to in the Texas collaborative process" for use by SWBT in Texas. *Illinois Merger Order*, at 256. As the Commission explained in referring to these liquidated damages and assessments: "Our goal is to ensure that any conditions imposed in this Order are not illusory, but rather specific and enforceable, and that enforcement measures are adequate to ensure full compliance with the conditions. The Texas plan, in principle, and the related commitments serve to achieve these goals." *Id*. at 220. At the same time, the Commission made clear what its goals did *not* include: "Our interest is not to penalize the company but rather to have compliance with our order." *Id*. at 221.

In keeping with the Commission's stated intent that Ameritech Illinois's payments under the voluntary plan would not "penalize the company" (and with the FCC's admonition that a

[2] As part of a periodic review of the performance measures and standards taking place after the hearing, the parties agreed to reduce the number of performance measures to 150.

shortfall in a performance test does not necessarily show discrimination), Ameritech Illinois's underlying obligation to make payments was undertaken by its consent. CLECs adopting the plan agreed not to use the payment of liquidated damages or assessments, or the existence of the underlying plan, "as evidence that Ameritech has discriminated in the provision of any facilities or services under Sections 251 and 252" of the 1996 Act. Am. Ill. Ex. 1.0, Attachment 2, § 6.2. Further, the proposed plan stipulated that "Ameritech's performance with respect to this remedy plan may not be used as an admission of liability or culpability for a violation of any state or federal law or regulation." *Id*.

Like the Commission, the FCC has reviewed and approved the Texas remedy plan, finding that it satisfied the criteria for an effective plan and that it "would discourage anti-competitive behavior by setting the damages and penalties at a level above the simple cost of doing business." *Texas 271 Order*, ¶ 423. Since then, the FCC has reaffirmed that endorsement, approving virtually identical plans used by SWBT in Kansas, Oklahoma, Arkansas, and Missouri. *Kansas & Oklahoma 271 Order*, ¶¶ 269-280; *In re Joint Application by SBC Communications Inc., et al. for Provision of In-Region, InterLATA Services in Arkansas and Missouri*, CC Docket 01-194, 2001 WL 1456806, ¶¶ 128-134 (rel. Nov. 16, 2001) ("*Arkansas & Missouri 271 Order*").

As part of Condition 30, the Commission directed Ameritech Illinois to participate in collaborative discussions regarding "any additions, deletions, or changes to the performance measurements, standards/benchmarks, and remedies that are implemented by SBC/Ameritech in Illinois." *Illinois Merger Order*, at 260. The Commission stated that "[i]f a dispute over any such addition, deletion, or change cannot be resolved through the collaborative process, any participant may ask the Commission to resolve such dispute." *Id*. The Commission further held that "[t]he participant proposing the addition, deletion, or change retains the burden of proving that such addition, deletion, or change should be adopted in Illinois." *Id.*

III. <u>THE PRESENT PROCEEDING</u>

The purpose of the present proceeding is to consider changes to the voluntary remedy plan implemented by Ameritech Illinois as a condition of the Commission's approval of the SBC/Ameritech merger. Pursuant to the *Illinois Merger Order*, Ameritech Illinois implemented the Texas performance measures and standards effective with July 2000 data. Am. Ill. Ex. 1.0 (Fioretti Direct) at 5. Ameritech Illinois then participated in collaborative proceedings to discuss proposed changes to the performance plan. As noted above, the parties reached agreement on performance measures and standards, and presented that agreement to the Commission in the Joint Petition that opened this docket. Am. Ill. Ex. 1.0 (Fioretti Direct) at 5. With respect to remedies, the CLECs participating in the collaborative sought to replace the existing remedy plan with an entirely different plan. In addition, the CLECs proposed an additional scheme of standards and remedies described as "Parity with a Floor." The parties were unable to reach agreement on these proposals. The ALJs issued a Proposed Order on January 22, 2002.

IV. DESCRIPTION OF EXISTING REMEDY PLAN

In this section, we describe the remedy plan that is now in force, so as to provide a starting point for evaluating the modifications recommended by the Proposed Order. The "Exceptions" section that follows describes each proposed modification to which Ameritech Illinois excepts, and the basis of Ameritech Illinois' exception.

A. When Remedies Are Assessed.

In the FCC's words, remedies should provide "a meaningful and significant incentive to comply with the designated performance standards" and a remedy plan should provide "a reasonable structure that is designed to detect and sanction poor performance when it occurs." *In re Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York*, 15 F.C.C. Rcd. 3,953, ¶ 433 (1999) ("*New York 271 Order*"). The critical point here is that remedies should sanction poor performance *only* "when it occurs." To be meaningful, remedies should be assessed only where they are deserved – where Ameritech Illinois really provides poor performance to a CLEC or CLECs. Am. Ill. Ex. 1.0 (Fioretti Direct) at 9; Am. Ill. Ex. 3.0 (Levy Direct) at 5-6.

All parties and Staff agreed that, to have meaning, a remedy plan must address the problem of random variation. Am. Ill. Ex 3.1 (Levy Rebuttal) at 3 (citing testimony). This sort of variation is part of everyday life. Am. Ill. Ex. 3.0 (Levy Direct) at 3. On average, we expect a perfectly fair coin flip will come up heads 50 percent of the time and tails the other 50 percent, but the individual flips do not always go "heads, tails, heads, tails, heads, tails." Thus, flipping a fair coin 50 times does not always yield exactly 25 heads and 25 tails (in fact, the laws of probability dictate that the odds of that result are only 11 percent). *Id.* at 25. The average family might have 2.3 children, but no family has (or could have) exactly that number.

The same variation affects wholesale and retail performance. In a given month, Ameritech Illinois might install a certain type of service in 3 days on average. Not every such installation, however, will take exactly three days. Some installations will take a little less than three days, others a little more – not because of any wrongdoing or discrimination by Ameritech Illinois or anyone else, but because of slight differences in random factors like weather (*i.e.* the repair work might take longer in cold or rain) or traffic (*i.e.* it might take a few minutes longer for the technician to arrive at the site due to the timing of traffic lights), or to any other differences in the work, such as the nature of the installation required. *See* Am. Ill. Ex. 3.0 (Levy Direct) at 5. So if you were to look at the time for a single installation, or compute the average for a sample of installations taken from the total, it would likely be somewhat different from the overall average. *Id*. Thus, even if wholesale transactions follow the exact same process, through the exact same systems, and receive the same level of attention and effort from Ameritech Illinois as their retail counterparts, the time required for any one order or group of orders (wholesale or retail) is likely to be different. *Id*. As the FCC has acknowledged (*New York 271 Order*, App. B, ¶ 2):

> We note that random variation is inherent in the incumbent LEC's process of providing interconnection and access to unbundled network elements. Our concern is primarily that the process that the incumbent LEC employs be nondiscriminatory. Thus, the incumbent LEC could have a provisioning process that is identical in its ability to provide the same function to retail customers and to competitive LECs, but because of random factors outside the control of the BOC, the average completed interval could vary for retail customers and competitive LECs from month to month, such that for one particular month, the metric for competitors would show a longer average interval than would the metric for Bell Atlantic's retail customers. Thus, metric results showing weaker performance to competitors could be due to random variation in the measures, even though the process is inherently nondiscriminatory.

Over the long run, we would expect these differences to even out, but remedies are assessed on subsets of performance data (for a given CLEC, in a given month) and they go only one way (to the CLECs); Ameritech Illinois does not receive a remedy or even a credit if wholesale performance is *better* than the standard. Am. Ill. Ex. 1.1 (Fioretti Rebuttal) at 11.

Statistical analysis provides a scientific method for analyzing the many thousands of monthly performance results to assess whether they show some real disparity in performance, as opposed to mere random variation. Am. Ill. Ex. 3.0 (Levy Direct) at 3-4. In the FCC's words, "the use of statistical analysis to take into account random variation in the [performance] metrics is desirable" and "[s]tatistical tests can be used as a tool in determining whether a difference in the measured values of two metrics means that the metrics probably measure two different processes, or instead that the two measurements are likely to have been produced by the same process." *New York 271 Order*, App. B, ¶¶ 2-3.

We describe statistical concepts in more detail under Exception II below. But the two basic principles underlying the Ameritech Illinois plan are common sense:

1. It is more likely that there is an underlying disparity if there is a large gap between wholesale performance and the applicable standard, as opposed to a small difference. Am. Ill. Ex. 3.0 (Levy Direct) at 7-8. If retail performance is three days, one would be more confident that there is a true disparity if wholesale performance is 30 days than if wholesale performance is 3.0000000001 days.

2. It is more likely that there is an underlying disparity if a large number of performance tests show a significant shortfall, than a scattered few. *Id.* at 8. If there are 6,000 performance tests a month, one would be more confident that there is some disparity if there are 5,999 apparent failures than if there is only one.

Statistical science is the method by which we apply these two common-sense principles to performance results and decide whether the number and size of differences make us confident enough of a disparity that Ameritech Illinois should pay a remedy. *Id*. at 7-9. The first step is to look at each individual performance test, measure the size of the difference between wholesale performance and the applicable standard (using a common measure known as a "z-statistic") and compare that difference to a "critical value" – the size difference or "z" that is large enough to give us 95 percent confidence that there is some underlying disparity. *Id*. at 7-8, 13-15.[3] (Another way of expressing this 95 percent confidence level is to say that there is a 5 percent risk of "Type I error" a concept described in more detail under Exception II below. *Id*. at 8, 25-26.) For parity tests with 30 or more "observations," the actual z-statistic is determined from a test known as a "z-test"; for parity tests of less than 30 observations, the z-statistic is generally computed by a permutation test, such as the Fisher Exact Test, which is designed for small sample sizes. *Id*. at 10-11, 20-21; Am. Ill. Ex. 6; Am. Ill. Ex. 1.0 (Fioretti Direct) Attachment 2, § 4.2.

The second step is to look at all the performance tests for that CLEC in the aggregate: to take the number of individual tests that have a z value above the critical value, and compare that number of tests to the "k" value – the number of individual tests exceeding the critical "z" value that is enough to give us 95 percent overall confidence that there is some real disparity instead of differences due to random variation. *Id*. at 8-9, 19-20.

[3] The critical value is expressed in the same statistical measure (based on a common statistical measure of variation called the "standard deviation") as the z-statistic, so that the comparison of the actual z-statistic to the critical value is an apples-to-apples comparison. See Am. Ill. Ex. 3.0 (Levy Direct) at 13-17 & Attachment B (describing calculation of z-statistic). The z-statistic and critical value are not expressed as a fixed measurement or percentage of time or a fixed count of transactions, as they are designed to work for a wide variety of possible performance measures (such as hours, days, percentage of missed due dates, rate of trouble reports). Thus, one cannot say, in advance, that a fixed difference (say, an hour) or a percentage difference (say, an interval that is 5 percent longer than retail) would exceed the critical value. One first has to convert the difference into a z-value.

The threshold values of *z* and *k* are determined from the number of performance tests for a given CLEC in a given month, using the laws of probability and standard statistical equations. Section 9.3 of the existing Remedy Plan (Attachment 2 to Am. Ill. Ex. 1.0) contains a table that shows the threshold values for *z* and *k* for the various possible numbers of performance tests. The table itself was developed by AT&T. *See* Section II.B. *infra*.

Illustration. Assume that CLEC "A" has performance data in 76 performance measurement categories: say, the Average Installation Interval for unbundled 2-wire loops, the Average Response Time for Customer Service Record inquiries, and so on. Am. Ill. Ex. 3.0 (Levy Direct) at 17-19. The critical value of *z* for that CLEC would be 1.68, while the threshold value of *k* would be 6 (both taken from the row for 70-79 tests in the Table at Section 9.3 of the Remedy Plan). *Id.* Then we look at the results of the 76 tests:

- If 6 or less show a z-statistic of at least 1.68, we do not have enough confidence that there is any disparity, and no Tier 1 payments are assessed.
- If more than 6 tests show a z-statistic of 1.68, a Tier 1 payment is assessed on each apparent failure after 6; for example, if 10 tests have a z-statistic of 1.68, Tier 1 payments are assessed on 4 tests (10 - 6).[4]

B. How Much Remedies Are Assessed.

Once one determines that a remedy is appropriate, the next step is to calculate its amount. The Remedy Plan divides performance measures and the associated remedies into two tiers. Am.

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4 It is possible, of course, that the source of these disparities is some factor outside of Ameritech Illinois' control: for example, a natural disaster or other Act of God, or some mistake or wrongdoing by the CLEC (such as submitting all of its orders for the month simultaneously and flooding the system). Am. Ill. Ex. 3.0 (Levy Direct) at 23. If the Commission were to decide that this is the case, the Remedy Plan allows it to waive part or all of the affected remedies, Am. Ill. Ex. 1.0 (Fioretti Direct) at 10-11, and establishes an expedited "fail safe" procedure by which Ameritech Illinois can petition the Commission for such a waiver.

Ill. Ex. 1.0 (Fioretti Direct) at 12. Tier 1 liquidated damages apply to performance measurements that affect individual CLECs (*e.g.*, the interval for installing or restoring service), and are paid to the CLECs that have received substandard performance if they have adopted the Remedy Plan in their interconnection agreements. *Id*. Tier 2 assessments apply to general, competition-affecting measurements, and are paid to the State Treasury. *Id.*

Each tier uses the following basic formula:

(Number of occurrences, if applicable)

x (remedy "base")

= Remedy Amount

Number of Occurrences. The first factor is designed to reflect the number of transactions that received substandard performance. Am. Ill. Ex. 1.0 (Fioretti Direct) at 12. Most of the liquidated damages and assessments in the existing Remedy Plan are calculated on a "per occurrence" basis: the amount increases with the volume (number) of affected transactions. *Id.* at 12-13.[5] The premise, though, is to pay on *affected* transactions, not all transactions. The calculation is best illustrated by an example. Assume that Ameritech Illinois filled 591 unbundled loop orders for CLEC A, but missed 113 due dates, yielding a rate of missed due dates of 19.1 percent. *Id*. at 14. A rate of about 96 missed due dates would have passed the

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[5] There are a few performance measures that do not use the per-occurrence model. *Id*. at 13-14. For some measures, the volume of transactions is very low, but could affect a large number of customers (*id*. at 14): for example, a single order for unbundled local switching could cover a large area. In those cases, the existing Plan does not include a "per occurrence" factor; rather, the remedy is calculated on a "per measure" basis. *Id*. Alternatively, for a few measures, the volume of transactions can be very large, so at a certain point the incremental effect of any single transaction is minimal. *Id*. at 13-14. In such cases, the existing plan calculates remedies on a per occurrence basis, but places a limit on the remedy amount. *Id*. at 14. Effectively, the "per occurrence" remedy becomes a "per measure" remedy on these few measures, once they reach a substantial volume. *Id*.

applicable statistical "parity" test. *Id.* Because Ameritech Illinois missed 17 more due dates than it would have missed if it had been in parity, the per-occurrence factor is 17. *Id.* at 14-15.

In this way, the number of occurrences reflects both the volume of transactions and the degree of disparity (*see id.* at 12-15):

- *Volume*: All else equal, if the CLEC in the above example had ten times more orders, the remedy amount would be about ten times higher; if the CLEC had only one-tenth as many orders, the number of occurrences (and thus, the ultimate payment) would be about ten times lower.
- *Degree of Disparity*: The remedy amount also increases as performance worsens. If Ameritech Illinois had missed 296 of the 591 due dates in the above example (a rate of about 50 percent), the number of occurrences would have increased from 17 to 200.

Remedy Base. The number of occurrences (if applicable), is then multiplied by a "base" remedy amount. The base increases with the measure's priority, designated as "High," "Medium," or "Low." *Id.* at 15-16. A "high" priority is assigned to those measures that have a direct impact on the end user. *Id.* The base amount also increases with the duration of disparity – that is, if Ameritech Illinois missed the same performance measure for that CLEC in the previous month or months. *Id.* at 15.

Section 8.2 of the Remedy Plan contains a table that lays out the base amounts for each priority and for duration of disparity. To follow our previous illustration, the measure for missed due dates is a "high" priority measure. The base amount for the first month of disparity is $150, so if Ameritech Illinois had passed the test for this measure in the preceding month, the plan would take the per-occurrence factor of 17 above, multiplied by $150, for a payment of $2,550.

Am. Ill. Ex. 1.0 (Fioretti Direct) at 15. If the disparity continues in the next month, the base amount increases to $250. *Id.* If the disparity continues after that, the base amount increases to $500 in the third month, $600 in the fourth month, $700 for the fifth month, and $800 for the sixth month and each following month. *Id.* Once the disparity is corrected, the base amount would be reset to $150.

C. How Remedies Are Paid.

Once a CLEC adopts the Remedy Plan, remedies are automatic and self-executing. Am. Ill. Ex. 1.0 (Fioretti Direct) at 20. Performance reports are due on the 20th day of the month after the reporting period; the related remedy amounts, if any, are due 30 days after that. *Id.* at 20-21. Thus, the performance report for July data is due by August 20, and the associated remedies are due by September 20. *Id.* at 21.

EXCEPTIONS

The Proposed Order correctly retains the existing Remedy Plan as a base, and correctly recommends that the new plan proposed by the CLECs be rejected. The Proposed Order also recommends several changes to the existing plan. Ameritech Illinois takes exception to two of these modifications, and seeks clarification as to a third. As demonstrated below:

I. The Commission should reject the proposed multiplication of remedy amounts, because it lacks evidentiary support.

II. The Commission should not eliminate the existing Plan's "K table" because that table helps ensure that remedies will not be assessed in error when Ameritech Illinois has complied with its obligation of nondiscrimination.

III. The Commission should clarify the Proposed Order's procedure for CLECs to "opt in" to the Remedy Plan.

I. THE COMMISSION SHOULD REJECT THE PROPOSED ORDER'S UNSUPPORTED "MULTIPLIERS" ON REMEDY AMOUNTS

A. Discussion.

As described above, liquidated damages and assessments under the existing Remedy Plan are, in most cases, the product of two factors: (1) the number of "occurrences" that received poor performance, multiplied by (2) a "base" dollar amount, which increases with the measure's priority and with the duration (number of consecutive months) of non-compliance. The Proposed Order retains this basic methodology but recommends that all Tier 1 liquidated damages to CLECs be doubled, and that all Tier 2 payments to the State be multiplied by a factor of three. The basis for Ameritech Illinois's exception is straightforward: The proposed multipliers are arbitrary and thus do not have the necessary evidentiary support that the *Illinois Merger Order* requires to warrant changing the Plan.

The Proposed Order itself acknowledges the lack of evidence to support the multipliers. With respect to Tier 1 payments to CLECs, the Proposed Order quite properly refers to such payments as liquidated damages, and recognizes (at 33) that "the law on liquidated damages provisions is clear that in order for such a provision to be enforceable, the amount must be a reasonable forecast of, or just compensation for, the harm that is caused by the breach." The ALJs then correctly acknowledged that there was no evidence or even a contention that the multiplied remedy amounts bear any relation to the damages they are supposed to compensate – indeed, the Proposed Order finds that "[t]he CLECs admit that no attempt has been made to calculate the amount necessary to compensate them adequately for poor performance." *Id.* Notwithstanding the acknowledged lack of evidence, the Proposed Order recommends that Tier 1 payments be doubled – as a compromise between the existing plan and Staff's proposal that such payments be tripled.

While we respect the desire to strike a balance, the balance here was an inappropriate one. This proceeding is bound by the four corners of the merger agreement on which it was founded. Where there is no evidence to support *any* increase in Tier 1 payments – as the Proposed Order acknowledges to be the case here – the only appropriate course is to reject the proposed increase in its entirety, not to award part of it. That is the clear command of the *Illinois Merger Order*, which states (at 260) that "[t]he participant proposing the addition, deletion, or change" to the existing performance plan "retains the burden of proving that such addition, deletion, or change should be adopted in Illinois." Thus, the Proposed Order's suggestion that Tier 1 liquidated damages be doubled – despite the acknowledged lack of evidentiary support for such an increase – would not only violate fundamental principles of agency decision-making, but also deviate from the merger agreement.

The Proposed Order's analysis of Tier 2 payments to the State is equally erroneous. It proceeds from the assumption that Tier 2 payments constitute "regulatory fines or forfeitures." That analogy is incorrect. Fines and forfeitures are compulsory payments imposed by the government "as punishment for some offense." *United States v. Bajakajian*, 524 U.S. 321, 327 (1998); *see also People v. 1991 Chevrolet Camaro, VIN 1GFP23E9ML117842*, 251 Ill. App. 3d 382, 388, 620 N.E.2d 563, 567 (2d Dist. 1993) ("[F]orfeitures comprise a type of punishment"). Tier 2 payments under the Remedy Plan are not compulsory, but the result of an obligation that was undertaken by Ameritech Illinois's consent. They are not assessed because of an offense (because the FCC has held that an incumbent's failure to satisfy an individual performance standard does not automatically mean there has been any wrongdoing); to the contrary, the Remedy Plan expressly states that Ameritech Illinois's performance under the plan is not "an admission of liability or culpability for a violation of any state or federal law or regulation."

Am. Ill. Ex. 1.0, Attachment 2, § 6.2. And Tier 2 payments are not "punishment," as the merger agreement that forms the backbone of this proceeding expressly disclaimed any intent to "penalize the Company." *Illinois Merger Order*, at 221.

Because there is no record to support the proposed doubling of Tier 1 and tripling of Tier 2 payments as a reasonable estimate of, or just compensation for, any damage, and because there is likewise no factual and legal support for the recommendation that each and every statistical variation amounts to a culpable offense that requires punishment, this aspect of the Proposed Order must be rejected.

The proposed multipliers for Tiers 1 and 2 apparently stem from a common, but erroneous, premise: that the existing plan does not create sufficient incentives for compliance. There would not be sufficient evidence to support such a view, if that is what motivated the Proposed Order here; if anything, the record as a whole refutes that assertion. First, during the tenure of the plan, Ameritech Illinois instituted several procedures to improve performance, and the result has been a marked improvement. Am. Ill. Ex. 1.0 (Fioretti Rebuttal) at 6-7.

Second, the Proposed Order overlooked the fact that the existing plan already contains natural "multipliers" that are designed to increase remedies in the event that performance continues at unacceptable levels over time. For example, if Ameritech Illinois fails to meet the same performance standard in two consecutive months, the remedy amount escalates in the second month. If poor performance continues, the remedy amount continues to escalate, reaching a maximum amount in the sixth month and thereafter. Thus, if the concern was one of creating adequate incentive, the existing plan's design already addresses that issue.

The results for October through December 2000 illustrate that the existing remedy plan, with its natural multipliers, provides sufficient incentive for compliance, and that the proposed multipliers are unwarranted. As noted below, Ameritech Illinois passed nearly 89 percent of its performance tests in December 2000. The existing remedy plan would still assess remedies of $2.9 million per month, providing incentive for continued improvement. In fact, payments for December 2000 increased over the preceding months, even though performance improved – demonstrating the Plan's natural multipliers at work. But the Proposed Order would increase the tab to $8 million for the month, an amount vastly out of step with "A-minus" performance. The results for October and November show the same unsupported increases in remedies, leading to total payments of nearly $17 million despite 88.3% compliance.[6] Note, too, that payments would likely increase in subsequent months even if this compliance rate were maintained, due to the natural multipliers that escalate payments in the existing plan over time.

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[6] The amounts in this paragraph and the accompanying table are taken from ALJ Exhibit 2, while the amounts in the second-to-last column (payments under the existing plan) are taken from Staff Ex. 2.2. The accuracy of Ameritech Illinois's performance data and remedy calculations are being audited by KPMG in a separate proceeding. For purposes of this proceeding, although we present percentages and dollar figures for illustrative purposes, the precise figures for October – December 2000 are not important. Rather, we present them to give the Commission a more concrete illustration of two broader points: (1) Ameritech Illinois's performance has, if anything, improved during the tenure of the remedy plan; and (2) the estimated payments under the Proposed Order in the event Ameritech Illinois achieves a "pass" rate of almost 90 percent (whether or not that rate was actually achieved in October – December 2000) would exceed $6 million per month.

	# TESTS	# PASSED	PASS RATE	PAYMENTS PER EXISTING PLAN	PAYMENTS PER PROPOSED ORDER
October: Tier 1	5,708	5,009	87.8 %	$0.9 million	$2.5 million
November: Tier 1	5,804	5,155	88.8 %	$1.1 million	$ 2.6 million
November: Tier 2	267	207	77.5 %	$1.2 million	$ 3.6 million
November Total	6,071	5,362	88.3%	$2.3 million	$ 6.3 million
December: Tier 1	5,795	5,189	89.5%	$1.4 million	$ 3.5 million
December: Tier 2	372	290	78.0%	$1.5 million	$ 4.5 million
December Total	6,167	5,479	88.8%	$2.9 million	$ 8.0 million
October – December Total Remedies	17,946	15,850	88.3%	$6.1 million	$16.8 million

This proceeding is conducted pursuant to the Commission's *Illinois Merger Order*, and that Order makes clear that the Commission's "interest is not to penalize the company but rather to have compliance with our order." *Id.* at 221. Ameritech Illinois respectfully submits that the existing plan has already proved sufficient to motivate "compliance with our order" and that the additional multipliers in the Proposed Order would be penal on their face – effectively punishing Ameritech Illinois for substantial improvements.

B. Recommended Changes To Proposed Order

Based on the foregoing, the Commission should replace the fifth and sixth paragraphs under section XII.D of the Proposed Order with the following:

> Based on our review of the record, we do not believe that Tier 1 or Tier 2 payments should be increased. The CLECs do not make any specific recommendation for increasing the dollar amounts in Ameritech's Plan, nor do they provide any evidence of monetary damages that would be necessary to support such a change. Staff contends that the Ameritech Plan will not provide sufficient incentive for Ameritech Illinois to improve its service, but fails to provide sufficient evidence to support that contention. If anything, the record demonstrates that Ameritech Illinois has instituted several improvements during the tenure of the Plan, and that those improvements have resulted in an increased rate of compliance with performance standards. Further, the Plan is already designed to escalate remedies in the event that poor performance persists with respect to a particular performance measure or standard. Accordingly, we do not find that either Staff or the CLECs have presented sufficient evidence to satisfy their burden of proof or to support changes in the Remedy Plan.

II. THE COMMISSION SHOULD RETAIN THE "K" TABLE FOR ANALYSIS OF PERFORMANCE IN THE AGGREGATE

As described above, the Commission-approved Remedy Plan uses statistical analysis to address random variation and to help ensure that remedies are assessed only for a real disparity in performance. Specifically, Ameritech Illinois applies statistical analysis to the results of individual performance tests, and to the results of all such tests in the aggregate. These methods are designed so that Ameritech Illinois will pay remedies to a CLEC if there is 95 percent confidence that there was some real disparity in performance for that CLEC in the month reported. The Proposed Order correctly retains (with some modification) the existing approach for individual performance tests, but incorrectly recommends that the analysis of results in the aggregate – via the "K table" – be eliminated.

A. Background

1. Statistical Analysis

The goal of statistical testing is to examine data and help one reach a conclusion about what it means. Am. Ill. Ex. 3.0 (Levy Direct) at 3. A typical approach is to propose a "hypothesis" and then look at the data to decide whether to accept or reject that hypothesis. *Id.* In assessing remedies, we are looking at a large number of performance measurements to test the hypothesis that Ameritech Illinois is providing the same treatment to CLECs as it provides to its retail operations (nondiscriminatory service). *Id.* at 4. If that hypothesis is false – in other words, if there is some shortfall in wholesale service – a remedy should be assessed. *Id.* at 5-6. If the parity hypothesis is true, however, a remedy would not be warranted, because it would constitute punishment for good behavior. *Id.* at 6.

All parties acknowledge that, in analyzing performance data, one needs to consider the effect of random variation inherent in such data. Am. Ill. Ex. 3.1 (Levy Rebuttal) at 3 (summarizing testimony). All parties agree that statistical analysis is the way to address such variation. Much of the argument revolved around how best to address two types of potential error that random variation can create. *Type I Error* refers to the risk that we will reject the hypothesis of parity, conclude there is some shortfall in performance, and assess a remedy even though there is no real disparity. Am. Ill. Ex. 3.0 (Levy Direct) at 25. For example, one might flip a coin 50 times and have it come up heads more often than tails even though the coin was fair; calling that coin unfair would be a Type I error. *Id.* at 25. In the performance context, assume that Ameritech Illinois provides perfectly nondiscriminatory repairs for CLECs – using the same procedures, electronic systems, personnel, level of effort, etc. that it uses for its retail service – but the average time to repair for the month in question turns out to be 22.1 hours for wholesale and 22 hours for retail, with the slight difference due to random variation in the conditions for each of the individual repairs. Paying a liquidated damage in that case would be a Type I error: a false failure.

Conversely, *Type II Error* refers to the risk that one will *accept* the parity hypothesis (and therefore not assess a remedy), even though it is not really true. *Id.* at 26. For example, one might flip a coin that was "loaded" to come up heads 70% of the time, but due to random chance the first 50 flips might be split evenly between heads and tails; calling the coin fair would be a Type II error. *Id.* at 26. In the performance context, assume that Ameritech Illinois purposely designs its repair procedures to shortchange CLECs – say, by telling its technicians to take an hour-long nap in the middle of every CLEC repair, but not for any Ameritech Illinois repair – but the average time to repair still turns out to be 22 hours for wholesale and retail because random variation happened to go against Ameritech Illinois and offset the one-hour nap. If we were to decide there was "parity" in wholesale and retail repair processes, we would be making a Type II error – a false pass.

The risks of Type I and Type II error are inversely related. Staff Ex. 2.0 (Patrick Direct) at 20. All else equal, one can reduce the risk of Type II error by reducing the "critical value" of *k* and *z* (the number and size of differences between wholesale performance and the applicable standard) that would lead us to assess remedies. That approach, however, would increase the risk of Type I error. By making it easier to find failure, we are increasing the risk of false failures. Conversely, making it easier to pass (and harder to fail) the test would reduce the risk of Type I error, but increase the risk of Type II error.[7]

Common sense also dictates that the risk of missing a disparity – that is, the risk of Type II error – decreases with the size of the disparity at issue. In the example above, random variation in one month hid a 1-hour disparity in the wholesale repair process. Clearly, it is less likely that a larger disparity (*e.g.* if Ameritech Illinois ordered its technicians to process all retail repairs immediately, but to delay all wholesale repairs for a full week after they are reported) would not show up in the performance data. Am. Ill. Ex. 3.0 (Levy Direct) at 28.

2. How The Remedy Plan Addresses Type I and Type II Error.

The concepts of random variation, Type I error, and Type II error – and the use of statistical analysis to control them – are not new, nor are they unique to performance measurement. And the methodology used in the Remedy Plan – setting the Type I error rate at 5 percent – has been accepted for some time. Its key elements were first proposed and supported by AT&T – the lead CLEC in this proceeding – in an FCC rulemaking on performance

[7] All else equal, an increase in sample size reduces the risk of Type 1 *and* Type 2 error, just as surveying more people reduces the risk of error in a survey. Am. Ill. Ex. 3.0 (Levy Direct) at 28. But in a remedy plan, we have no control over sample size: the plan already examines all transactions in the reporting period, and the number of transactions is determined by the market.

measurement. There, AT&T filed an affidavit of its expert, Dr. Colin Mallows, to address "the use of statistical analysis as a means of determining whether ILECs are providing parity service to new competitors." Am. Ill. Ex. 3.0 (Levy Direct) Attachment C, ¶ 5. Dr. Mallows agreed that the FCC was "clearly correct that 'reporting averages of performance measurements alone, without further analysis, may not reveal whether there are underlying differences in the way incumbent LECs treat their own retail operations in relation to the way they treat competing carriers' and that the FCC "properly proposes to require the use of statistical tests to determine whether measured differences in average ILEC performance . . . 'represent true differences in behavior rather than random chance.'" *Id.*

AT&T also recognized the possibility of Type I and Type II error, and the relationship between them. In the words of its expert, Dr. Mallows, "[i]f we choose to make the Type I error small, then the Type II error will be large; and conversely." *Id.* ¶ 22. Further, AT&T recognized that it would be unlikely that random variation would mask a large disparity in treatment – a one-week delay, as opposed to a one-hour nap. Accordingly, "AT&T propose[d] to set the Type I error at no more than the conventional level of 5%." *Id.* Its expert explained that "[t]his controls the frequency of false alarms to be at most 5% while making the probability of Type II errors small for violations that are of substantial size." *Id.* As a result, "a one-tailed test with Type I error held at the 5% level strikes a fair balance between the need to account for both Type I and Type II errors." *Id.*

3. The K Table.

As described above, the Remedy Plan considers performance data at two levels to keep the Type I error rate at 5 percent. The first step is to compute the z-statistic for each individual performance test, and to compare each *z* to a critical value, which is set to yield a 5 percent Type I error rate (*i.e.* 95 percent confidence of disparity).

But an individual test is only a small piece of the puzzle. Ameritech Illinois has a large number of performance measures, and they are divided into numerous categories or sub-measures. As a result, there are thousands of performance tests each month. Am. Ill. Ex. 3.1 (Levy Rebuttal), at 5-6. Given that each one of those tests has a built-in Type I error rate of 5 percent, we would expect a significant number of false failures – individual tests that would erroneously indicate a disparity in performance – even if Ameritech Illinois were providing absolutely nondiscriminatory access across the board.

When AT&T first proposed the 5 percent Type I error rate in the above-described FCC performance measurement docket, AT&T correctly recognized the risk of a large number of errors if multiple tests are performed. As its Dr. Mallows pointed out, "[i]f we apply a large number, several hundred perhaps, of tests of individual performance measurement comparisons, each test having a Type I error rate of 5%, then we would expect, on average, about 5% of these tests to indicate non-compliance even when the ILEC is actually fully in compliance." Am. Ill. Ex. 3.0 Attachment C, ¶ 30. Similarly, at the hearing in this proceeding WorldCom's Dr. Jackson correctly saw the same issue (Tr. 193):

> Let's suppose we undertake a hundred trials. We do a hundred tests of those submeasures . . . . If Ameritech provided service that was in complete parity to all 100 submeasures, the question arises how many of those submeasures do we think would be rejected in the statistical test simply by chance. That's the question that relates to random variation.

The problem of inflated Type I error rates across multiple tests is well known in the field of statistics. Am. Ill. Ex. 3.1 (Levy Rebuttal) at 14 & n.6 (citing treatise). But this is simply another place in which statistical science mirrors common sense. However small the odds you will reach a given result on any one try, the odds get larger when you get more tries – whatever you are doing, and whatever result you are considering (so long as it is not impossible).

The "K table" is the solution that statistical science uses to hold the risk of Type I error at the desired level, here 5 percent. As AT&T's Dr. Mallows stated, "[w]e need to derive some threshold number of failed parity tests such that if more than this number are observed to fail, then non-compliance can be deduced." Am. Ill. Ex. 3.0 (Levy Direct) Attachment C, ¶ 30. He designed and proposed the K table to "determine how many of the individual measurements subjected to the above comparison tests need to demonstrate non-parity before an ILEC may be found to be in overall violation of its statutory duty." *Id.* ¶ 31. The value of K for any given number of tests conducted, was calculated to determine the "threshold number of tests . . . in such a way as to control the probability of an overall, or aggregate, Type I error at 5%." *Id.* ¶ 30. At the hearing, Dr. Jackson echoed AT&T's analysis (Tr. 193-94):

> What the K table does is it gives us a number, K, that says we could expect . . . no more than eight [of 100] statistical tests could be rejected with a 95 percent probability of being correct. In other words, we could reject all eight physical tests and still possibly be in and be 95 percent sure were in parity. If we reject more than that, we would be at least 95 percent sure that parity service wasn't being provided.

Likewise, Staff's Dr. Patrick recognized that AT&T developed the table of k and z values "to hold the overall Type I error level of his proposed remedy plan to 5%" and that the K table "is necessary to control for the fact that multiple tests are being performed by the ILEC each month." Staff Ex. 2.0, at 3.6.

The Remedy Plan applies the K table in a straightforward manner. Given the large number of performance tests that are conducted each month, we would expect a large number of these tests "to indicate non-compliance even when the ILEC is actually fully in compliance." Am. Ill. Ex. 3.0 (Levy Direct) Attachment C, ¶ 30. The Remedy Plan does not assess remedies on the first "K" apparent failures, because that threshold must be crossed "before an ILEC may be found to be in overall violation of its statutory duty." *Id* ¶ 31. Remedies are instead assessed on any failures after the K threshold is reached.

B. Discussion

The key to this issue is that the Commission not lose sight of the straightforward – and indisputable – reasons why the K table exists and should be retained. The objective of the Remedy Plan is to encourage Ameritech Illinois to strive for "compliance with the Commission's order" and with the nondiscrimination requirements of the 1996 Act. If Ameritech Illinois *does* reach perfect parity, but the K table were removed the way the Proposed Order recommends, the Remedy Plan would assess hundreds of erroneous remedies every month based solely on random variation – due to the large number of performance tests and the built-in 5 percent Type I error rate. Am. Ill. Ex. 3.1 (Levy Rebuttal) at 5-6. It goes without saying that the Commission's goal should be to reward full compliance, not punish it.

Granted, the day of perfect parity has not yet arrived – although Ameritech Illinois has made strides in improved performance. Am. Ill. Ex. 1.1 (Fioretti Rebuttal) at 6; Tr. 370. But the solution to that is the one the Remedy Plan already employs – to levy a remedy on those test failures that exceed K (the number of failures needed to show a disparity with reasonable scientific certainty) and to hold out the carrot that remedies will be reduced to near zero when perfect parity does arrive. Elimination of that step would assure that the arrival of perfect parity will lead only to continued payment of unwarranted penalties – hardly the proper incentive.

The main basis for their Proposed Order's opposition to the K table is that the CLECs would receive more money without it. The Proposed Order (at 21) describes the table as a "forgiveness factor" that reduces the amount of remedies paid. But the question here is not whether elimination of the K table would mean more money in remedies; the question is whether the additional remedies would be warranted. The Proposed Order implicitly assumes that

Ameritech Illinois has performed poorly (and the CLECs deserve a remedy), whenever the first-stage (individual measure) statistical test is not passed. Under that view, any reduction in remedies would be a "forgiveness." The problem is that the individual statistical tests are not always right when they indicate poor performance: in fact, they are designed to achieve only 95 percent confidence, so on average they will indicate "failure" based solely on random error 5 percent of the time even where no real performance failure has occurred. To use the words of AT&T's own expert, "the fact that this many tests indicate non-compliance does not give conclusive evidence that the ILEC is not in compliance with its Section 251 nondiscrimination obligations." Am. Ill. Ex. 3.0, Attachment C, ¶ 30. The K table does not "forgive" remedies that are otherwise warranted; it prevents the imposition of remedies that are not warranted. CLECs do not *deserve* erroneous remedies in the first place, and the fact that Ameritech Illinois does not have to pay such erroneous remedies under the existing Plan means only that the Plan more accurately reflects actual performance (rather than random variation).

C. Recommended Changes To Proposed Order

The last nine paragraphs of Section XIII.D of the Proposed Order (beginning "Ameritech, CLECs and Staff") should be replaced with the following:

> Ameritech, CLECs and Staff propose different critical values. The CLECs propose adoption of their balancing critical value approach or in the alternative, a fixed critical value of 1.04. Both the CLECs' alternate proposals result in very low critical values and thus many more failed tests. The Commission agrees with Staff and Ameritech Illinois that these approaches are unacceptable. The CLECs also criticize the Ameritech Plan because it calls for a fixed critical value. We note, however, that in the alternative to their balancing critical value approach, the CLECs suggest 1.04 as the critical z value. Apparently, CLECs accept the idea of a fixed critical value, as long as it is low enough.
>
> Both Ameritech Illinois and Staff, meanwhile, agree that the critical value should reflect a 95 percent confidence level or 5 percent risk of Type I error. Staff, however, proposes that this principle be applied only to individual statistical tests, and that the "K" table, which is used to control Type I error in the aggregate, should be eliminated. The Commission disagrees. Individual

statistical tests are only part of the analysis. Given the thousands of performance tests conducted each month and a Type I error rate of 5 percent, the elimination of the K table would virtually guarantee the imposition of hundreds of erroneous remedies, based solely on random variation, each month. In other words, Ameritech Illinois could be behaving in a perfectly nondiscriminatory manner yet still pay hundreds of remedies. The Commission does not believe such unwarranted payments would be consistent with the intent of Condition 30, which is not to penalize the Company but to encourage compliance.

III. THE COMMISSION SHOULD CLARIFY THE PROPOSED ORDER'S "OPT-IN" PROCEDURE FOR IMPLEMENTATION OF THE REMEDY PLAN

A. Discussion

CLECs opted into the existing Remedy Plan via a standard amendment to their interconnection agreements. The Proposed Order (at 15) calls for CLECs to opt into the revised Plan via a different process: namely, "a CLEC wishing to be subject to the remedy plan must notify SBC/Ameritech and the Commission, in writing, of its intent to 'opt-in' the Remedy Plan." The notice "becomes effective 20 days from the date of filing said written notice with the Commission." *Id.*

The Commission should revise the Proposed Order to clarify three aspects of how the "opt-in" procedure would work in practice. First, a number of CLECs already have language in their interconnection agreements that incorporates the existing Remedy Plan. *See* Tr. 142: "we do have an amendment in Illinois for AT&T and for TCG." To avoid any ambiguity as to which plan is in effect, the Proposed Order should be clarified so that when a CLEC "opts in" to the revised Remedy Plan, (i) that Plan supersedes the plan previously in effect for such CLEC, and (ii) the CLEC and Ameritech Illinois will then follow the opt-in with an amendment to any existing remedy plan language in their interconnection agreements. The amendment will not delay the effective date of the CLEC's "opt-in" – it will merely clarify the effect of the opt-in, and assist CLECs in evaluating existing interconnection agreements for purposes of adopting them via section 252(i) or a "Most Favored Nation" ("MFN") procedure.

Second, the Proposed Order currently requires only that the notice should be sent to "SBC/Ameritech." The Commission should provide specific instructions for where the opt-in notice should be directed, to avoid confusion and to ensure that the notice is properly received and promptly processed. Otherwise, a CLEC may send the notice to an employee of an

Ameritech Illinois affiliate, or to another Ameritech Illinois contact outside the performance reporting group, and the recipient might not be able to redirect that notice to the proper personnel in time for prompt implementation. Therefore, Ameritech Illinois requests that the opt-in notice should be provided pursuant to the "Notice" clause of the CLEC's interconnection agreement, with a copy to Ameritech Illinois's Regulatory Offices. (The Commission may also wish to specify the proper recipient at its own offices for the copy that is to be filed at the Commission.)

Finally, the Proposed Order calls for the "opt-in" notice to become effective in 20 days. However, Ameritech Illinois's systems and processes are designed to report performance and calculate remedies on a calendar month basis, and the Remedy Plan expressly incorporates that calendar-month system. It would be highly impractical and confusing to apply two different remedy methodologies in a single month. Accordingly, Ameritech Illinois requests that the Proposed Order be clarified so that the "opt-in" notice becomes effective 20 days from the date of filing, but that remedies are to be calculated under the Revised Plan starting with the first full calendar month after that effective date.

B. Recommended Changes to Proposed Order.

The indented text following the third paragraph of Section VI.D of the Proposed Order should be revised as follows (proposed additional text underscored):

> A CLEC wishing to be subject to the remedy plan must notify SBC/Ameritech <u>(pursuant to the "Notice" provision in that CLEC's interconnection agreement with Ameritech Illinois, with a copy to Ameritech Illinois's Regulatory Offices)</u> and the Commission, in writing, of its intent to "opt-in" the Remedy Plan. The CLEC's "opt-in" becomes effective 20 days from the date of filing said written notice with the Commission<u>, and supersedes the plan previously in effect for that CLEC. Remedies shall be calculated in accordance with the Remedy Plan beginning with the first full calendar month following the effective date.</u> Voluntarily negotiated amendments also must be filed with the Commission, although such amendments are subject to Commission approval.

CONCLUSION

For all the reasons set forth above, Ameritech Illinois requests that the Commission adopt the Proposed Order with the modifications described above.

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